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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1961

No. 910

WILBURN BOAT COMPANY, ET AL.,
Petitioner,

vs.

FIREMAN'S FUND INSURANCE COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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STATEMENT.

Respondent, for the limited purpose of opposing the Petition, accepts the statement of the case and findings set forth in the opinion of the Court of Appeals.

As that opinion partly shows (A. 44) there is much more in this record on which Respondent relies as to Petitioners' concealments, misrepresentations, frauds, and the materiality thereof, on which the Court of Appeals did not find it necessary to rule for the reason that it had sustained part of Respondent's defense.[1]

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[1] For the purpose of reference herein the Petition and Brief in support thereof is referred to as "Br."; Petitioners' Appendix is referred to as "A" and Respondent's Appendix to its brief in the Court of Appeals, filed herein by Petitioners, and containing part of the Record not otherwise printed is referred to as "Resp. App."

SUMMARY OF ARGUMENT.

Petitioners' gross misrepresentation of the opinion of the Court of Appeals cannot disguise the fact that the Court carefully considered the laws of Texas on which Petitioners planted their case, and found for Respondent solely on the basis of that law. That does not raise any of the questions Petitioners put forward as to the McCarran Act, this Court's decision in *Wilburn Boat Company* v. *Fireman's Fund Insurance Company*, 348 U. S. 310 (1955), state's rights, nor old federal admiralty decisions.

I.

Petitioners contend that the law of Texas applies in this cause as the opinion of the Court of Appeals discloses. The applicable law of Texas was made the sole basis of decision. Petitioners' questions presented which relate to issues not involving Texas law are not raised thereby; they have been propounded in order to obscure the actual and express basis of decision.

A. Petitioners have erroneously characterized the decision of the Court of Appeals as a trial *de novo* overlooking the undoubted power and duty of the Court of Appeals to reverse the findings of the trial court if found to be clearly erroneous. Evidential findings of the trial court were in fact accepted by the Court of Appeals which differed with some of the lower court's inferences, or conclusory "findings," in the light of its own further findings of specific fact made on the basis of evidence which the Court stated to be clear and uncontradicted. Petitioners point to no contradictory evidence whatever.

B. R. L. McKinney was Petitioners' agent for the purpose of obtaining insurance. This is a concurrent finding of both the trial court and appellate courts and was made on the basis of unchallenged Texas

law. The Petitioners realize that they cannot recover, without a reversal of this concurrent finding which they hopefully reserve for a brief on the merits.

II.

The Court of Appeals gave careful and thoughtful consideration to all Texas authority cited and relied upon by Petitioners and the trial court, and rightfully concluded that Petitioners could not recover under the laws of Texas which the Court assumed applied. In so doing the Court of Appeals correctly found that the trial court's understanding of that law was in error.

A. The Court of Appeals concluded on undisputed evidence that Petitioners' admitted and intentional failure to disclose that the insured vessel was to be used to carry passengers for hire was as material as any fact that could be imagined. On the basis of clear and uncontradicted evidence the Court held that any findings of the trial court to the contrary was clearly erroneous.

B. The Court of Appeals having found that Petitioners in a material respect concealed the nature of the risk, in order to preclude another rejection, and that their agent, in furtherance of that concealment, deliberately falsified his reason for seeking insurance from Respondent in Illinois, did not consider it necessary to pass on Petitioners' other numerous and admitted concealments and misrepresentations.

C. The Court of Appeals looked to the statutes of Texas to determine whether or not there was anything in them which would prevent Respondent from relying on the stipulation in the policy prohibiting concealments and misrepresentations of material facts. The Court concluded that there was nothing in the applicable statutes of Texas which would prevent Respondent from relying on the stipulation.

(1) The construction of the Texas Insurance Code adopted by the Court of Appeals is based on numerous Texas cases.

(2) The Court of Appeals considered all the authorities cited by Petitioners and the trial court and concluded that Petitioners could not recover. Even under Petitioners' view of the law of Texas they could not recover.

(3) Petitioners intended to use the insured vessel to carry passengers for hire at the time they secured the insurance from Respondent. The Court of Appeals found that the intended use was as material a fact as could be imagined and that Petitioners' agent intentionally concealed the fact from Respondent in order to preclude another rejection, having already been turned down by numerous Texas underwriters. Such a finding by the Court of Appeals on clear and undisputed evidence in itself precludes Petitioners from recovery on the basis of the authorities they urge in this petition.

D. The opinion of the Court of Appeals is not in conflict with *Wilburn Boat Company* v. *Fireman's Fund Insurance Company*, 348 U.S. 310 (1955) nor with the decision of *Vernon* v. *Aetna Insurance Company*. In fact, the latter case finds that the law of Texas upholds the forfeiture of an insurance policy on the basis of falsehoods material to the risk made by an assured before a *loss* occurred.

PETITIONERS SEEK TO ATTRACT ATTENTION BY GROSSLY MISREPRESENTING THE OPINION BELOW. WHAT THE COURT HELD WAS THAT PETITIONERS CANNOT RECOVER UNDER THE LAW OF TEXAS. PETITIONERS FINALLY RECOGNIZE THIS, AND THEIR ATTEMPTS TO DIFFER WITH THE LEARNED DISCUSSION BY THE COURT OF APPEALS OF THE LAW OF TEXAS ARE MISLEADING AND FUTILE.

The opinion of the Court below is now reported at 300 F. 2d 631, and shown as Petitioners' Appendix B. (A. 13-45).

The opinion is not what the petition says it is.

The petition says:

> "In order to justify its decision, two Circuit Court Judges (one Judge dissenting) ruled that strict admiralty rules of concealment and misrepresentation are so firmly entrenched in American Jurisprudence that the power of the several States to regulate the forfeiture of boat insurance is nullified." (Br. 5-6)

The opinion says (A. 29):

> "As we see it, then, appellant's defense here raises only two issues for decision. They are: (1) whether the facts concealed and misrepresented were material to the risk, and (2) whether there is anything in the Texas statutes which would prevent appellant from relying on the concealment and misrepresentation of material facts as a defense."

The dispositive issues are then decided adversely to Petitioners on the basis of *Texas* law.

The *petition* is principally an elaboration of its own misstatements that the Court of Appeals decided the case on the basis of "some early federal admiralty de-

cisions." (Br. 3, and *passim.*) The *opinion*, on the contrary, proceeds on analysis and exposition *of Texas law.*

The *petition ignores* that the trial court did not question that Petitioners and their agent McKinney were guilty of the specific concealments and misrepresentations *set forth* in the opinion. (A. 15-25) It passes over the finding of both courts below that McKinney, who, on "undisputed evidence" was guilty of concealment and misrepresentation, detailed in the opinion, in procuring the transfer and subsequent enlargement of the coverage, was the agent of the Petitioners. (A. 25, 30, n.4) It states that Petitioners' purpose is to attack that concurrent finding. (Br. 3,4)

The petition says, the Court of Appeals should have held that a special agreement against material concealment or misrepresentation before the *loss* (not before the *contract*) accomplishes nothing whatever that would not equally be accomplished by the law of deceit, which avoids contracts for fraud in the inducement but only when there is "intent" to deceive, and "reliance." The Court of Appeals was disinclined to read a contract as though a separate, express and unambiguous term thereof were not there. As to misrepresentations *before* the *loss* that have been specially contracted against, no Texas statute makes such an agreement ineffective (A. 35-37).

Moreover, the Court of Appeals not only held that, when there was a breach of *contract*, "intent" and "re-

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The **Vernon** case expressly distinguishes falsehoods **after** the loss, which its facts involved, in view of a Texas statute not apposite here (nor anywhere referred to by Petitioners) that requires intent to deceive and reliance as to falsehoods in assureds' **proof of loss** (A, 41, n. 11, and 79).

liance" were unnecessary as a matter of law, *but first held that they were present as a matter of fact.* (A. 29-31) The opinion bases this on evidence that is "clear" and "undisputed" as to specific facts that are corroborated by evidentiary findings of the lower court. The undisputed facts and evidence set forth in the opinion leave room for no other reasonable conclusion than that McKinney, Petitioners' experienced insurance agent, when he sought insurance from Respondent in Illinois, after being repeatedly refused by underwriters in Texas (including his usual facilities for writing his marine insurance) (R. 80, 83, 132-139, 155) concealed the true nature of the risk in order "to preclude another rejection"—and "deliberately" falsified his reason for seeking insurance from Respondent (A. 31).

Do Petitioners seriously contend that facts which on "undisputed evidence" (A. 31) would call for a higher premium and different policy terms as to a watchman, are not "material to the risk" or did not influence the insurer?

Occasionally it may seem that Petitioners are actually confused; compare their mistaken statements as to what Respondent "admits," etc., etc., (Br. 12, 13) with the opinion (A. 29, 30, 31 and A. 29, n.3)

Having found concealment in order "to preclude another rejection" and this "deliberate falsification" by Petitioners' agent at the outset, the Court finds no need to cumulate (A. 31), but is unmistakably clear that the circumstances detailed in its opinion do not by any means exhaust the "strong evidence of fraud" in this record (A. 44).

The other admitted concealments and misrepresentations detailed in the opinion (A. 29-33) are massive evidence of fraud on all of which the petition is silent—

with one exception. They say that when they got this policy transferred to themselves they had not yet mortgaged the vessel (Br. 14-15). The point is not just that they had already borrowed the first $10,000.00 from the bank for which they presently mortgaged it, as the lower court's findings show. They did not disclose these existing mortgages (A. 23-24) when they later sought the $30,000.00 increase in coverage in December 1948 (A. 29, n. 3; R. 177, 505, 589, 592; Resp. App. 71a, 70a).

And when, at some time after January 25, 1949 (A. 20) they were asked whether there were any mortgages or encumbrances on the vessel they answered that there were "None" (A. 29, n. 3)—although there were three unpaid mortgages for a total of $28,000.00 (A. 23, 24)—of which the $20,000.00 due the bank had then been *past due since* January 4th. (Stipulation, Resp. App. 6a, R. 616)

Asked if the engine was new or old and its cost, they said it was new and cost $5000.00, whereas in fact it was a used engine they had got for $2700.! (A. 33)

The opinion gives other examples. (A. 31-35) The list is long, and could be extended.

Even the partial extent to which the opinion shows this pattern of misrepresentation and concealment leaves no rational doubt of the *intention* of those men to hoodwink the insurer.

The petition says that a Texas statute requires an application to be attached to the policy (Br. 13). Before the Court of Appeals their position was that because *some* of their misrepresentations were in a form submitted by the insurance company after the increase in coverage, that destroyed *their* availability *as defenses*

on the ground that the form on which they were written is what is normally called an "application form" (A. 34).

The short answer to that is that they made material false representations *besides* those in the "application form" (A. 31-34). A further answer was that they were guilty not only of false material *misrepresentations*, but also of material *concealments*. (Art. 21.35; A. 34, n. 6) A longer answer could have been made if there had been any occasion for it. This policy had been out of the hands of the insurer since it was issued to Marshall and Shuler (Resp. App. 84a, 85a) and its transfer to Petitioners and still later enlargement by $30,000.00 were contracts subsequent to the issuance of the policy, as the lower court's findings show. (A. 18; 19) Statutes like Art. 21.35 requiring the insurer to attach an application to a policy are held not to apply to new contracts entered into with an assured after the policy has issued, and that is the law of Texas: "And the articles [21.35, 21.34] have no application to contracts entered into between the insurer and assured subsequent to the issuance of the policy." 24 B Tex. Jur. § 9, p. 50 (1956).[1]

Of course they cannot make a new point here.

The position of the petition is: "If an insurance company fails to comply with this statute the written statements made by the assured cannot be used as evidence to support the defense of misrepresentation." (Br.13)

[1] See also **American Nat. Ins. Co. v. Smith**, 13 S.W. 2d 720, 722 (1929) as to Art. 21.35 (A. 70). That statute appears in Texas Rev. Civ. Stat. 1911, p. 1035, as Art. 4951. Art. 21.42 (A. 69) as to applying Texas laws, had been in effect for 23 years (Texas Acts 1903, p. 94—Petitioner's Appendix gives only the dates of later codifications) when the Texas court decided in the **Smith** case that, because the "attached application" requirement of 21.35 expressly limits itself to policies "issued or contracted for in Texas" (A. 70), it has no broader application; and that, on the findings of both courts below, the insurance was "contracted for" in Illinois.

Finally, Petitioners say that Art. 21.16 states that the issue of materiality of a misrepresentation is a question of fact to be determined by the court or jury trying the case. They here seem to argue that this statute is meant to deprive the parties of the right to appellate review on the issue of materiality of a misrepresentation. No Texas case is cited, or can be found, for that remarkable construction. Texas cases cited by the Court of Appeals hold otherwise (A. 30) and the effect and interpretation of this statute as to misrepresentation is to preclude reliance on a policy clause against misrepresentation *unless* it is (a) fraudulent, or (b) material, or (c) the fact misrepresented contributes to the loss. (A. 41, notes 10 and 11)

In deciding the first dispositive issue and reversing the conclusion of the lower court that nothing concealed or misrepresented by Petitioners or their agent McKinney was material, the Court of Appeals relies on the test of the materiality of a fact to an insurance contract that is stated and applied by Texas courts under Texas statutes (Opinion, App. B, *passim*). As the opinion points out, the authorities are "virtually unanimous." This is a thoughtful and learned application of Texas law, under Texas statutes, by a court especially skilled in Texas law. (A. 34-37) The Court does not rely on "early admiralty decisions"!

(Continued)

(Pacific Fire Ins. Co. v. Donald, 224 S.W. 2d 204, 207 (Tex. 1949) and effectively "issued" in Illinois when put in the mails in Illinois for Petitioners' agent (Fidelity Mutual Life Assoc. v. Harris, 57 S.W. 635, 639 (Tex. 1900).

At every point the petition illustrates the reason for this court's reiterated policy, when asked to disturb results reached by Courts of Appeal on local state law.

Incidentally, Petitioners cite no admiralty authority to show whether the admiralty view of materiality is the same or different. They assume that they could not recover under the admiralty decisions, raise no question as to that, and insist that Texas law governs. What the Court of Appeals has decided is that they cannot recover under Texas law. *That being decided*, any question of whether they could recover under some other law than the law of Texas on which they planted their case, was said to be of minimal importance below, *and the petition does not even raise that question here*. On the contrary, the petition proceeds throughout on strenuous insistence that every aspect of the case is ruled by the law of Texas. What the Court of Appeals held is, precisely, that the law of Texas is against them (Opinion, App. B, *passim*).

The petition itself finally makes crystal clear that its inflammatory talk about state rights, citizens of Texas, disregard of the McCarran Act, or of this Court's decision on a previous aspect of the cause, is a false alarm. For after all the contrived pyrotechnics of its supposed "Questions Presented," they conclude with the simple question:

> "7. Were the appropriate insurance laws of Texas accurately applied?"

The *existence* of that question exposes what has gone before as mere tub-thumping, to attract undeserved attention.

I.

THE LAW OF TEXAS, WHICH PETITIONER SAYS APPLIES IN THIS CAUSE WAS THE BASIS FOR DECISION IN THE COURT BELOW. PETITIONERS' "QUESTIONS PRESENTED" ON THIS POINT ARE A MERE HOAX DESIGNED TO OBSCURE THE EXPRESS BASIS OF DECISION.

The first question Petitioners mistakenly claim presented in this cause is as follows:

> "1. Can outmoded and strict rules of marine insurance law, adopted by some early admiralty courts, supersede a subsequent Act of Congress directing that:-
>
> > 'The business of insurance and every person engaged therein shall be subject to the laws of the several States which relate to the regulation or taxation of such business.' (McCarran Act of 1945, 15 USC, Sec. 1011, 1012.)
>
> and the 1955 Supreme Court decision in *Wilburn Boat Company* v. *Fireman's Fund Insurance Co.*, 348 U. S. 310 (Appendix A), so as to justify the refusal of the Court of Appeals to recognize the above Act of Congress and this Court's decision and fashion its own law and facts to support the forfeiture of a fire-marine insurance policy on the grounds of concealment and misrepresentation?" (Br. 2-3)

This "question" is based on its own erroneous assertions that the Court of Appeals refused to recognize the McCarran Act or this Court's decision but fashioned its own law and facts in deciding this case!

The obvious answer to the above "question" is that the Court, assumed throughout that the law of Texas applied here (A. 43) and applied it (A. 29-43). No rules but Texas Rules were in fact applied though the Court said that even if other rules were applied Peti-

tioners could not recover (A. 42), a proposition that Petitioners do not question. The allegation that the Court of Appeals "fashioned its own law" (Br. 3) with respect to concealment and misrepresentation is amazing in view of the fact that *this is precisely what the Court said it would not do*:

> "The law of deceit applies to insurance contracts as it does to all other contracts, but if the contracting parties stipulate that deceit is unnecessary to put the contract at an end, it is not for the courts to question the wisdom of their decision. If such stipulations are regarded as contrary to public policy, the legislature or the courts can say so. Since, however, neither the legislature or courts of Texas have made this decision, we can not see how or why we should make it for them." (A. 42-43).

The second question Petitioners mistakenly say is presented by the decision below is:

> "2. Are the strict rules of misrepresentation and concealment, referred to in some early federal admiralty decisions, so firmly entrenched in American Jurisprudence as to take precedence over State insurance codes and State Court decisions construing these codes and policy provisions in cases where fire and marine insurance policies are sold within the boundaries of a State to citizens of that State by a foreign corporation authorized to do business in that State?"

The foregoing is an attempt to conceal the true nature of the decision below with emotionalized verbiage — "strict" rules, "early" federal decisions, "precedence over" States, "citizens," "foreign corporation," etc.

The opinion of the Court of Appeals makes it clear that the rules of misrepresentation and concealment (strict or otherwise) which were the basis of decision in

this cause were those enunciated by Texas courts, not "early federal admiralty decisions" (A. 29-42, 43). The Court considered each aspect of the Texas Code relied upon by Petitioners and concluded that:

> "There is nothing in the Texas statutes requiring an intent to deceive and reliance if concealments and misrepresentations are to avoid a policy under an express contractual stipulation. *Rather, the Texas legislature had affirmatively indicated its position with respect to these contract provisions* by providing that they shall not bar a claim unless the concealment or misrepresentation relates to a material fact *or* a fact which contributed to bring about the loss." (A. 41). (Our emphasis)

Petitioners' third "question" is, if possible, a more inexcusable misrepresentation than the first two. It is:

> "3. Did the Supreme Court intend to limit its appropriate State law decision in this case (Appendix A), to strict rules of marine insurance warranties and exclude therefrom State insurance statutes and State court decisions regulating the forfeiture device of concealment and misrepresentation?"

State insurance statutes and State Court decisions regulating concealment and misrepresentation (and warranties) were *not* excluded; they were most carefully considered and expressly followed by the Court of Appeals.

The sixth "question presented" by Petitioners is but a variation of the first three (Br. 4) and is inapposite for the same reasons:

> "6. Can the sovereign right of a State, be impaired by Federal decisions relating to the forfeiture device of concealment and misrepresentation when Congress had declared that the continued regulation by the several States of the business of insurance is

in the public interest and that silence on the part of Congress shall not be construed to impose any barrier to the regulation of such business by the several States.'"

No federal decision was relied upon by the Court of Appeals as authority for its decision in this cause. *It will be carefully noted that Petitioners insist that the laws of Texas apply here.* (Br. *passim*) The Court of Appeals embraced that assumption, and, acting on it, held that Petitioners could not recover thereunder (A. 29-43). The petition assumes that rules of "the federal admiralty law" would bar them and *it presents no question as to that.* But what the Court of Appeals held is that they are barred *by Texas law.*

A. Petitioners' Erroneous Characterization Of The Court Of Appeals Decision As A "Trial De Novo" Overlooks The Unquestioned Power Of The Court Under Rule 52 F.R.C.P. To Examine The Whole Record Of The Cause Below And Reverse The Findings Of The Trial Court If Found To Be Clearly Erroneous. The Court Of Appeals Did Examine The Record. It Puts Its Reversal On Evidence It States To Be "Clear", And Evidence It States To Be "Uncontradicted." Petitioners Point To No Contradictory Evidence Whatever.

Petitioners for their fourth "question" state:

"4. On conflicting evidence [*sic*] can the Court of Appeals try a civil case *de novo* [*sic*] and disregard [*sic*] the fact findings of a trial Judge who saw and judged the credibility of witnesses, when the Federal Rules of Civil Procedure (Rule 52) and decisions of this Court forbid a Federal Appellate Court to do so and when Article 21.16 of the Texas Insurance Code provides that the issue of materiality is a 'question of fact to be determined by the court or jury trying the case'?"

What Petitioners mean by trial *de novo* is set forth in their argument at Br. 15. It appears to be "ruling that findings of fact of the trial court were clearly erroneous." They state that such a conclusion on the part of the court is unsupportable when "the testimony is conflicting and reasonable men differ as to inferences to be drawn from the evidence." (Br. 15)

Petitioners choose to ignore that the evidence here *was not conflicting*. Each misrepresentation, concealment (and breach of warranty) discussed by the Court of Appeals was corroborated by the trial court (A. 14-25). The Court of Appeals on the basis of the record as a whole obviously felt that certain inferences the trial court drew from undisputed facts were not those on which reasonable men might differ—that is why it concluded the trial court's findings were "clearly erroneous." (A. 31) It is to be presumed that the Court is well aware of the standard imposed by Rule 52 and its care to emphasize its awareness is conclusive on this point.

Petitioners also rely on Art. 21.16 of the Texas Insurance Code which provides that the issue of materiality is a "question of fact to be determined by the Court or the jury trying the case" (Br. 3). This section was thoroughly considered by the Court of Appeals in its opinion (A. 35-37) which concluded that its view of the effect of that statute was supported by numerous Texas cases which "adopted much the sounder view" (A. 36). There can, of course, be no reasonable assertion that this statute takes a finding on the issue of materiality of misrepresentation (to say nothing of concealment—A. 37) out of the ambit of appellate review, especially where the court concludes that manifest error has been committed. Petitioners cite no Texas case for that view. Texas authority cited in the opinion is to the contrary, *e.g.*

Indiana & Ohio Livestock Ins. Co. v. *Smith*, 157 S. W. 756, 756 (Tex. Civ. App. 1913). Texas has not tried to stop a U.S. Court of Appeals from its duty to reverse what is clearly erroneous (and could not).

B. Under Texas Law, R. L. McKinney Was Petitioners' Agent For The Purpose Of Obtaining Insurance And Petitioners Were Bound By McKinney's Concealments And Deliberately False Representations To Respondent At The Time He Sought Insurance From Respondent And When He Sought An Increase In Insurance. Both The Trial Court And The Court Of Appeals So Held. Petitioners Cannot Recover Without Reversal Of That Concurrent Finding And Conclusion Of Both Courts. They Admit That Their Petition Suggests No Reason Whatever Why It Should Be Reversed.

Petitioners' fifth "question presented" is not discussed in their petition but is hopefully reserved by them for their brief on the merits (Br. 4). They criticize the Court of Appeals for rejecting absurd and untenable conclusions of the lower court that were excluded by undisputed fact, but ask this Court to take the case in order that they may attack the concurrent finding that McKinney was their own agent and not the agent of the insurer. The trial court expressly found (A. 62) and the Court of Appeals concurred (A. 25) that the insurance agent referred to therein *was* Petitioners' agent and *not* the agent or representative of the Respondent *under the Texas Insurance Code* (A. 62, 25). Petitioners cannot prevail on *any* theory advanced in the petition, without upsetting that concurrent finding and conclusion, as their reservation of the point recognizes and the face of the opinion makes plain (A. 30-31).

II.

AFTER CAREFUL CONSIDERATION OF ALL THE TEXAS AUTHORITIES CITED BY PETITIONERS AND THE TRIAL COURT, THE APPELLATE COURT CONCLUDED CORRECTLY THAT PETITIONERS COULD NOT RECOVER ON THE BASIS OF THE APPLICABLE TEXAS LAW AND THAT THE TRIAL COURT'S UNDERSTANDING OF THAT LAW WAS IN ERROR.

Petitioners themselves finally acknowledge that the court below held against them on the basis of Texas law. Their final question is:

> "7. Were the appropriate insurance laws of Texas accurately applied?"

As pointed out previously the Court of Appeals found at the onset of its decision that two issues were decisive:

> "As we see it, the appellant's defense here raises only two issues for decision. They are: (1) whether the facts concealed and misrepresented were material to the risk, and (2) whether there is anything in the Texas statutes which would prevent appellant from relying on the concealment and misrepresentation of material facts as a defense."

The *existence* of the misrepresentations and concealments on the part of the Petitioners was not an issue on the appeal of this cause because they were first found by the trial court (A. 14-25) which based its findings on the stipulations and admissions of the Petitioners. These findings were accepted and adopted by the Court of Appeals (A. 14-25). The trial court had asserted that none of the misrepresentations and concealments was material (A. 68) but the Court of Appeals upon con-

sideration of the Texas test of materiality reversed that, saying:

> "It is impossible to see how the District Court could conclude otherwise than that some of the facts concealed and misrepresented were material to the risk." (A. 30)

As to the standard of materiality to be applied, the Court of Appeals assumed that Texas law applied (A. 43) quoting *Indiana & Ohio Livestock Ins. Co.* v. *Smith, supra* (A. 30) which is in turn amply supported by other and later Texas decisions cited in the opinion, *e. g., Fidelity Union Fire Ins. Co.* v. *Pruitt*, 23 S.W. 2d 681, 684 (Tex. Comm. App. 1930) and *Inter-Ocean Ins. Co.* v. *Ross*, 315 S.W. 2d 71, 73-74 (Tex. Civ. App. 1958). Indeed, as the Court of Appeals found, authority on the question is "virtually unanimous." (A. 30)

> "The authorities are virtually unanimous in holding that 'a material fact is any fact,' the knowledge or ignorance of which would naturally influence an insurer in making the contract at all, or in estimating the degree and character of the risk, or in fixing the rate on the insurance." (A. 30)

The Court then proceeded to consider and deal with each of the concealments and misrepresentations separately, first considering the concealment of the contemplated and actual use of the vessel as *an excursion boat* and Petitioners' agent McKinney's concealment of that fact and misrepresentation of his reason for seeking insurance from Respondent.

A. The Court Below Found That Petitioners' Failure To Disclose To Respondent That The Insured Vessel Was To Be Used To Carry Passengers For Hire Was As Material As Any Fact That Could Be Imagined And That Any Finding By The Trial Court To The Contrary Was Clearly Erroneous. The Record And The Admissions Of Petitioners Conclusively Support The Court Of Appeals.

The Court's findings are set forth at A. 30-31 and are as follows (the emphasis is by the Court):

> "As to the contemplated and actual use of the Wanderer *as an excursion boat*, the simple fact is that McKinney, the agent of the appellees to procure insurance, attempted to place the risk with numerous marine underwriters in Texas but was turned down without exception *because these underwriters considered the risk to be too hazardous*. To preclude another rejection, McKinney did not disclose to the appellant that the Wanderer would be used to carry passengers for hire. Moreover, he accepted for the appellees a policy which contained a warranty that it would not be so used, at a time when it was their intention to breach the warranty. Further, he deliberately falsified his reason for seeking insurance from the appellant by stating that 'he had no facilities for writing hull coverage, *being located where he was*. The undisputed evidence in the record shows that insurance policies on excursion boats command a much higher premium than policies on private pleasure craft and that the former policies customarily contain a provision requiring the attendance of a watchman when the vessel is not in operation. In our view, the fact that the appellees intended to and did actually use the Wanderer to carry passengers for hire, was as 'material' to the risk as any other fact that could be imagined."

After stating the above the Court concluded significantly:

> "Any finding by the trial court to the contrary was clearly erroneous." (A. 31)

In consideration of the Court's holding on this question it is important to note the following:

(a) The trial court also found that McKinney was Petitioners' agent to procure insurance under Texas law (A. 62). (As the petition shows, Petitioners realize they cannot prevail without upsetting that concurrent finding.)

(b) McKinney attempted to place the risk with numerous marine underwriters in Texas but was turned down without exception because the risk was too hazardous. The trial court made no finding to the contrary, saying merely that McKinney was "not authorized" to write, on behalf of any of the companies he represented, the marine insurance the Petitioners desired (A. 54). The evidence on which the Court of Appeals made its finding is substantial, undenied on the record of the evidence (even undenied by the petition), and admitted by McKinney (R. 131-138, 155, 429, 590, 503).

(c) McKinney when he came to Respondent to procure insurance did not disclose to the Respondent that the Wanderer would be used to carry passengers for hire at a time when it was Petitioners' intention to breach the warranty. The above confirms the express finding of the trial court (A. 17, 58, 52, 56, Resp. App. 84a, 85a, R. 193, 175).

(d) McKinney deliberately falsified his reason for seeking insurance from Respondent by stating he had "no facilities for writing hull insurance coverage, *being located where he was*" (Resp. App. 66a; A. 30). That was not the real reason. He was "located" in Texas; the real reason was that the Texas

underwriters had turned him down on the risk. The trial court found that McKinney stated that he had no facilities for writing the hull coverage desired (A. 54). That statement was a falsification of his real reason for seeking insurance from appellant in Illinois, on the basis of McKinney's own testimony R. 80, 83-84, 132).

(e) The undisputed evidence in the record shows that insurance policies on excursion boats command a much higher premium than policies of insurance on private pleasure craft and that the former policies customarily contain a provision requiring the attendance of a watchman when the vessel is not in operation (*e.g.*, R. 503, 415, 416, 417). The trial court made no finding whatever on the point.

(f) The Petitioners intended to use the vessel for carrying passengers for hire before they purchased it and applied for the policy—and did use it for carrying passengers for hire after receiving the policy.

B. Because Of Its Finding On Petitioners' Deliberate Falsification And Concealment As To The Nature Of The Risk To Preclude Another Rejection The Court Below Concluded That It Was Unnecessary To Pass On Petitioners' Other Numerous And Admitted Concealments And Misrepresentations.

In view of its finding with respect to the materiality of the false representation and concealment as to the intent of the owners as to the prospective use of the vessel, and of McKinney's reason for seeking insurance from Respondent, the Court of Appeals found it unnecessary to pass on the materiality of other undisputed concealments and misrepresentations on which Respondent relies. (A. 31.)

C. The Court Below Considered All The Texas Statutes Having Possible Applicability To This Case And Concluded That There Was Nothing In Them Which Would Prevent Respondent From Relying On The Concealment And Or Misrepresentation Of Material Facts As A Defense.

The Court of Appeals defined the second issue before it as follows:

> "Whether there is anything in the Texas statutes which would prevent appellant from relying on the concealment and misrepresentation of material facts as a defense." (A. 29).

The Court thereupon examined the various Texas statutes which, according to Petitioners, forbade Respondent from relying on the contractual stipulation against concealment or misrepresentation. On the basis of its examination of these statutes as construed by the Texas decisions cited in its opinion (A. 29-43) the Court concluded that there was nothing in the law of Texas that would avoid Petitioners' binding covenant against their admitted misrepresentations and concealments and that they therefore could not recover from Respondent (A. 41-42).

The Court's holdings on Texas law were based upon "virtually unanimous" Texas authority (A. 30) and on "numerous" Texas cases which the Court believed adopted "much the sounder view." (A. 36) As this Court has repeatedly stated the various courts of appeal are skilled in the law of the states in which they sit and their ruling on questions of state law will not be disturbed unless clearly unreasonable. *Propper* v. *Clark*, 337 U. S. 472, 486-487 (1949); *Allegheny County* v. *Mashuda Co.*, 360 U. S. 185, 191 (1959).

1. The Construction Of The Court Below As To Art. 21.16, Texas Insurance Code Is Based On Numerous Texas Cases Which It Felt Adopted Much The Sounder View. Petitioners' Construction Of This Statute Rests On The Dicta Of One Case And Would Render Words Of The Statute A Nullity Contrary To Texas Rules Of Construction.

The Petitioners contend that in construing the Texas statute, Art. 21.16 Texas Insurance Code, relating to the issue of whether in establishing the defense of misrepresentation it is necessary to prove that the misrepresented fact was *both material and actually contributed to the loss* (Br. 12), the Court of Appeals "flatly refused" to accept the "authority" (*sic*) of *Trinity Reserve Life Insurance Co.* v. *Hicks*, 297 S. W. 2d 345, 349 (Tex. Civ. App. 1956) (Br. 12). Why the isolated and unsupported dictum of this case has special "authority" Petitioners do not say. The Court of Appeals considered the case and found that there were numerous Texas cases to the contrary which in its judgment adopt "much the sounder view." (A. 36).

The language of the *Trinity* case relied upon by Petitioners is a *dictum* of a Texas Court of Civil Appeals; the view taken by the court below is squarely stated as the view of the Texas Commission of Appeals, which is a Texas court of higher authority. *Fidelity Union Fire Ins. Co.* v. *Pruitt*, 23 S. W. 2d 681 (Tex. Comm. App. 1930). The *Ross* case cited by the court below (A. 36) *(Inter-Ocean Ins. Co.* v. *Ross*, 315 S.W. 2d 72, 73-74 Tex. Civ. App. 1958) is later than the *Trinity* case. And the view taken by such *more numerous* Texas authorities, including *later* Texas authority and *higher* Texas authority, is the only view that gives the *materiality* provision of the Texas statute *any meaning or effect at all*, as the Court of Appeals points out (A. 37). The rule of reason that every

expression of a deliberate writing, including statutes, *must* be given some meaning of its own, is also a particularly well-established rule of law in Texas; *e. g. Orsinger v. Schoenfeld*, 269 S. W. 2d 561, 564 (Tex. Civ. App. 1953); *General Insurance Corp. v. Laney*, 224 S.W. 2d 746, 751 (Tex. Civ. App. 1949). See also *McDonald v. Thompson*, 305 U.S. 263, 266 (1938). Presumably Petitioners are aware of this; the Court of Appeals for the Fifth Circuit certainly is.

It will be observed that the other opinion of the court below, quoted by Petitioners in their "Appendix E," fully endorses this interpretation of the Texas statutory scheme as to all falsehoods made "before the loss occurs" as follows:

> "Under the statutory scheme, only those falsehoods which are material to the risk, if made before the loss occurs, and only those which are material, fraudulently made, and which mislead the insurer and cause it to lose some valid defense, if made after the loss occurs, may be made the basis for voiding a policy pursuant to a forfeiture clause." (A. 79)

2. The Court Below, Far From Overlooking The Authority Relied Upon By Petitioners, Considered And Rejected It As Not Applicable. Even Under Petitioners' View Of The Texas Law They Cannot Recover; The Court Of Appeals Found Every Element Of Misrepresentation Petitioners Say Is Necessary Upon "Clear" And "Undisputed" Evidence.

Petitioners allege that the Court of Appeals "overlooked or failed to recognize the Texas rule that requires an insurance company to prove five constituent elements of misrepresentation before a policy can be declared forfeited," citing *Hanover Fire Ins. Co. v. Nash*, 67 S. W. 2d 452, 454 (Tex. Civ. App. 1934) (Br. 12). This state-

ment is manifestly erroneous, for the court carefully considered the trial court's opinion on this very point (A. 67-68) together with the identical authority here relied upon (A. 36). The appellate court concluded that the trial court had failed to appreciate the fact that one of this respondent's defenses was not that it had been deceived by the Petitioners (though it in fact was deceived A. 31) but that Petitioners had breached a specific provision of their contract (A. 38). This was a term which no Texas statute outlawed and was indeed a stipulation as to which the Texas legislature had affirmatively taken a position (A. 41). The Court held that under Texas law such a provision would indeed bar a claim if the concealment or misrepresentation related to a material fact *or* to a fact which contributed to bring about the loss (A. 41). The Court of Appeals concluded that Petitioners' concealment of the intended use (and actual use) of the boat related to material fact under Texas law (A. 30) and that the trial court's finding to the contrary was "clearly erroneous" (A. 31).

If we were to prefer Petitioner's view of the Texas law as to misrepresentation to that of the Court of Appeals, Petitioners would be in no better position. They were guilty also of material *concealment.* And the Court of Appeals also found every element that petitioners say is necessary to fatal *misrepresentation.*

Petitioners allege there must be five constituent elements of misrepresentation (Br. 12). These are, they say:

(a) *Making the representation*: The courts below found, McKinney, Petitioners' agent, represented to Respondent that he sought out Respondent in Illinois for insurance "because he had no facilities for writing hull insurance *being located where he was*" (A. 31, 54). The

truth was that his facilities had turned him down. This false representation was made by McKinney to Respondent at a time he was actively (indeed desperately) seeking to *obtain* the insurance in suit (R. 132-138, 155). As the Court found, it was a deliberate falsification (A. 31).

b. *Falsity thereof.* McKinney's stated reason for seeking insurance from Respondent *was false according to McKinney's own testimony* (R. 83, 132). He had various facilities to write marine insurance "located where he was" (R. 83). As the Court of Appeals found, he tried to place the risk with numerous underwriters in Texas but was turned down because these underwriters considered the risk to be too hazardous (A. 31, R. 429, 155, 134-138).

(c) *Reliance thereon.* The record is clear that if Respondent had been informed that the vessel was going to be used as an excursion boat it would not have issued the policy since it writes policies only on private pleasure risks and the underwriter in fact had no authority to write policies on vessels carrying passengers for hire, a risk which invariably required higher premiums and different terms requiring a watchman. (For example, R. 418, 503.) The policy was issued as a private pleasure policy and had no watchman provision (Resp. App. 41a *et seq.*). There is no evidence in the record to the contrary. The fact is, McKinney was specifically asked for all the information pertaining to the risk but he did not inform Respondent that the vessel was to be used for carrying passengers for hire (Resp. Appendix 66a-67a) though he was well aware of it (R. 175) and knew it was important (A. 30). Respondent clearly relied on McKinney's silence and on his false representation of the reason he called all the way from Texas to Illinois to obtain the policy. Had he told the truth the reaction of Respondent to this risk is too obvious to belabor.

(d) *Intent to deceive.* On the basis of its review of the plain record, the Court of Appeals concluded that the reason McKinney did not disclose the true nature of the risk to Respondent was "to preclude another rejection" (A. 31), *i. e.*, to induce Respondent to issue the policy. The Court further found that McKinney in furtherance of this purpose "*deliberately* falsified his reason for seeking insurance from respondents" (A. 31).

As this Court has said, when one who knows the truth speaks falsely his "intent to deceive" is presumed as a matter of law. *Claflin* v. *Franklin Fire Ins. Co.*, 110 U. S. 81, 95 (1881). McKinney's purpose was obviously to cause the Respondent to do other than it would have done had the truth been told. The Court so found.

The Court also noted that McKinney accepted a policy for the Petitioners which contained a warranty that it would not be used for carrying passengers for hire at a time when it was their *intention* to breach the warranty (A. 31). Both the trial court and the Court of Appeals found as a fact that Petitioners not only *intended* to use the vessel for carrying passengers for hire but actually used it for that purpose (A. 17, 22, 30).

(e) ***Materiality thereof.*** The Court of Appeals found on uncontradicted evidence in the record that insurance policies on excursion boats command a higher premium than policies on private pleasure craft, and that the former policies customarily contain a provision requiring the attendance of a watchman when the vessel is not in operation (A. 31). The Court also found as we have indicated above that when McKinney attempted to place the risk *as an excursion boat* with numerous underwriters in Texas he was turned down without exception because these underwriters considered the risk to be too hazardous (A. 31). The Court then concluded that in view

of the Texas test of materiality (A. 30) the concealed fact as to Petitioners' intention to carry passengers for hire "was as material to the risk as any other fact that could be imagined" (A. 31) and McKinney's affirmative misrepresentation as to the reason he sought insurance from Respondent was made in furtherance of that concealment (A. 31).

Thus it is apparent that even under the Texas authority on which Petitioners attempt to rely they are precluded from recovery under the policy in suit. Even the isolated expression of *Hanover* v. *Nash, supra* (Br. 12) that Petitioners quote, is that:

> "Concealment must, in the absence of inquiries, be not only material, but fraudulent *or the fact must be intentionally withheld.*" (p. 454) (Our emphasis)

Here the Court of Appeals unlike the Court in the *Hanover* case found that the concealment was material, and found that the concealed material fact was intentionally withheld (A. 31, 33).

3. The Fact As To The Vessel's Intended Use Was As Material A Fact As Could Be Imagined And Petitioners' Insurance Agent McKinney Knew It And Concealed It To Preclude Another Rejection.

The *Hanover* case in turn cites as its authority (p. 454) *3 Couch on Insurance*, § 776, p. 2517. That section, cited by Texas court as Texas authority, begins as follows:

> "Broadly speaking, concealment in other than marine risks [*sic*] exists where the insured has knowledge of a fact material to the risk which honesty, good faith, and fair dealing require that he should communicate to the insurer, but which he designedly and intentionally withholds. Another cardinal rule is that,

if the insured undertakes to state all the circumstances affecting the risk, a full and fair statement of all such circumstances is required. *It is also decided that anything unusual* in the use of a building, enhancing the risk, or any extrinsic peril outside and near a building insured, and which increases the risk, must be communicated, even though not requested."

The text continues on page 2518:

> *"But a concealment, for the purpose of the general rule, is fraudulent, if the insured knew that certain matters were material to the risk, yet failed to disclose the same, and this, although no inquiries were made. In fact, it would seem that, if a material fact is actually known to the assured, its concealment must of itself necessarily be a fraud,* and if the fact is one which the assured ought to know, or is presumed to know, the presumption of knowledge ought to place the assured in the same position as in the former case with relation to material facts; and if the jury in such cases find the fact material, and one tending to increase the risk, it is difficult to see how the inference of a fraudulent intent or intentional concealment can be avoided. *Again, it has been declared that, if a material fact has been concealed by the insured, it is equivalent to a false representation that it does not exist,* and that the essentials are the truth of the representations, whether they were intended to mislead, and whether insurer accepted them as true and acted upon them to his prejudice. *Again, concelament, although not fraudulent, will avoid a fire policy, if the conditions annexed to the policy and the form of application require the concealed fact to be stated, and if one of the conditions expressly provides that any misrepresentation or concealment will vitiate the policy."* (Emphasis added)

McKinney knew that this yacht would be used to carry passengers for hire. (R. 175; Resp. App. 66a, 67a).

Petitioners claim that a "more liberal" rule on concealment should have been used by the Court of Appeals instead of the "strict admiralty rule" (Br. 9). The obvious fact is that the Court *did not adopt any admiralty rule,* but assumed that Texas law, strict or otherwise, was applicable (A. 43) and applied Texas law (A. 30-41). Petitioners say that the "more liberal" rule has been expressed by this court in *Clark* v. *Insurance Co.,* 8 How. 234, 239, 12 L. Ed. 1061, 1066 (1850). In citing and quoting this case (Br. 9) however it is apparent that petitioners stopped reading too soon, for the Court continued at page 1067:

> "It is true, that, from what is reasonable and just, some exceptions must exist to this general rule, though none of them are believed to cover the present case. Thus the insurer must be supposed, if no special information has been asked or obtained, *to take the risk, on the hypothesis that nothing unusual exists enhancing the risk;* and hence, as in this case, if lamps are used in the picking room, which do enhance it, he must show that their use in the manner practiced was unusual or not customary, and then, though no representations had been asked or made, he would make out a case, where it was the duty of the insured to inform him of the fact, and where *suppressio veri* would be as improper and injuriors as *suggestio falsi. Livingston* v. *Mar. Ins. Co.* 6 Cranch, 281." (Our emphasis)

As the Court of Appeals found, there was indeed something unusual affecting the risk, *i.e.* instead of the private pleasure use normal to a yacht and to which the vessel was put formerly, the intention of petitioners was to convert a private pleasure yacht into an excursion boat, carrying passengers for hire, a fact as "material to the risk as any other fact that could be imagined", and it was intentionally concealed (A. 31). Respondent under the authority of *Clark* has in fact even under Petitioners' so-called "liberal" rule proved its defense.

The rule of the *Clark* case is not directly applicable here because Respondent relies upon its contractual stipulation against concealment (A. 38). However, the exception quoted above is part of the law of Texas as Petitioners admit (Br. 9). Thus in *American Central Insurance Co.* v. *Nunn*, 79 S. W. 88, 89 (Tex. Civ. App. 1904) on which Petitioners rely (Br. 9) the Court said:

> "When the insurer issues the policy without inquiry, he assumes the risk, *unless some unusual fact exists which affects the risk.*" (Our emphasis.)

In the instant case:

(a) McKinney was specifically asked at the outset to give all the facts concerning the risk (66a-67a, Resp. Appendix) and did not disclose a fact as "material as any that could be imagined."

(b) McKinney, an insurance agent, knew that the intended use of the vessel was material and all the more so because he had been turned down because the underwriters considered the risk too hazardous.

(c) McKinney made a direct misrepresentation of his purpose for coming to Respondent for insurance and misled the Respondent as to the nature of the risk. The *real reason* was that every one else had turned him down because the real risk (which was an excursion boat risk) was too hazardous. Do Petitioners contend that an insurance agent would not *know* that was material? (A. 31)

(d) An unusual fact concerning the risk did in fact exist and McKinney withheld it "to preclude another rejection." (A. 31)

Thus petitioners instead of supporting their position, show the correctness of the determination of the Court of Appeals. Petitioners cannot recover on any theory they advance.

D. The Decision Of The Court Below Is Entirely Consistent With This Court's Opinion In Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310 (1955) And The Court Of Appeals Later Decision Of Vernon v. Aetna Ins. Co. Which Finds That The Law Of Texas Permits The Forfeiture Of An Insurance Policy On The Basis Of Falsehoods Material To The Risk Which Were Made By The Assureds Before The Loss Occurred.

The decision of the Court of Appeals does not conflict with this Court's opinion in *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955) which left the regulation of marine insurance to the States (A. 12) at least where there is no "judicially established federal admiralty rule" governing the situation (A. 5). The Court of Appeals here applied Texas law and held that, under the law of Texas, Petitioners could not recover (A. 29-42). The Court stated that since the Texas legislature had not outlawed such stipulations as contrary to "public policy" it did not see how or why it should do so (A. 42). Federal Courts do not make state law.

Vernon v. Aetna Ins. Co. (Petitioners' App. "E") decides no more than the issues presented therein and is addressed to its facts. The Court of Appeals held that the trial court could not, under the law of Texas, grant summary judgment in favor of an insurance company on the basis of a contract stipulation against false swearing where the essential false swearing was an affidavit procured *after the loss by the insurance company's* investigator in apparent abuse of a confidential relation with the assured woman, and an inconsistent affidavit made after litigation on the policy had commenced. The court held that there were no Texas statutes dealing "directly with the question of avoidance of a policy because of false statements made subsequent to the institution of suit upon the policy, after denial of liability by the in-

surer." (A. 78) The public policy of Texas as expressed by its Insurance Code, the court found to be as follows:

> "Under the statutory scheme, only those falsehoods which are material to the risk if made before the loss occurs, and only those which are material, fraudulently made, and which mislead the insurer and cause it to lose some valid defense, if made after the loss occurs, may be made the basis for voiding a policy pursuant to a forfeiture clause." (A. 79)

The Court found in the instant case, here considered, that Petitioners' agent McKinney made various misrepresentations and concealed various matters of material fact *before the loss occurred* and indeed some at the time of applying for insurance (A. 30-33). As the Court said:

> "• • • [W]e have found that there was a false material representation at the time the policy was obtained by the insured. • • •" (A. 33)

As the *Vernon* case makes clear under the Texas statute a false material representation made *before the loss occurs* is a valid basis for voiding a policy of insurance pursuant to a forfeiture clause (A. 79). It is also to be noted that according to the *Vernon* case, as to those representations made before the loss occurs no fraud or reliance need be shown—this is only necessary in the case of false statements made *after the loss occurs.* Thus the *Vernon* case follows and reiterates its decision in the case now before this Court. In the light of *Vernon* the Court of Appeals has here conclusively demonstrated the existence of the statutory prerequisites to voiding the policy.

Nor does the *Vernon* decision in any way conflict with *Chaachou* v. *American Central Ins. Co.*, 241 F. 2d 889 (5th Cir. 1957) cited in the instant decision (A. 38-40). The court in *Vernon* said the case was not conflicting since it concerned fraudulent statements made in a *proof of loss*

and was expressly predicated on the absence of any statute similar to Art. 21.19 (A. 80). In the instant case there is likewise no applicable statute (A. 34-41). Art. 21.19 covers only false statements in the *proof of loss* which are not involved here (A. 41). The Court of Appeals found that there were no Texas statutes which required an intent to deceive and reliance if concealments and misrepresentations are to avoid a policy under an express stipulation (A. 41). This is confirmed by the *Vernon* case as to misrepresentations before the loss. Here in *Wilburn* all the misrepresentations and concealments found by the Court occurred *before the loss.* The public policy of Texas according to the Court of Appeals in *Vernon* is that false statements made before the loss occurred which are material to the risk "may be made the basis for voiding a policy pursuant to a forfeiture clause." (A. 79) The Court in *Wilburn* found that Petitioners' false statements were material and were in fact made the basis for forfeiture according to the policy terms (A. 41-42). The two decisions are therefore entirely consistent.

CONCLUSION.

For the reasons set forth above it is submitted that the Petition should be denied.

Respectfully submitted,

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